". . . the supervisory power serves the "twofold" purpose of deterring illegality and protecting judicial integrity."

See *Payner*, 447 U.S. at 735 n.8.

Given the repetitive nature and elaborate detailing of Petitioner's pleadings of the issues relevant to this case, as demonstrated above, it is quite clear that the lower courts have acted in a lawless manner. E.g.: eliminating the requirements of Fed.R.Civ.P. 12(a)(3)(A); and refusing to follow several dozen precedent-setting cases. Several U.S. Circuit Courts have ruled that precedents are required to be followed, unless overturned by an *en banc* decision of the court. See *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); *Cupples Farms v. Federal Land Bank of St. Louis*, 951 F.2d 883, 886 (8th Cir. 1991).

The D.C. Cir. refused to follow a number of precedents, and denied Petitioner's request for an *en banc* hearing. See App.1. See also Federal Rule of Appellate Procedure (henceforth "F.R.A.P.") 35(b)(1)(A). Petitioner prays that the *Payner* Opinion quoted *supra*, is still highly esteemed by this Court currently. Due to the denial of said *en banc* hearing request, a widespread departure from a number of precedents of this Court is evident, along with flagrant violations of the Constitution. These facts demonstrate the most "compelling reasons . . . to call for an exercise of this Court's supervisory power." See Supreme Court Rule 10(c).

Question 3. Is the Constitution as highly regarded today by this Court as it was when past decisions ruled that:

"Our duty is to . . . uphold the lawful authority of the court . . ., and yet

without hesitancy, where there has been an abuse of discretion, to correct it in the completest way."

See *B & O RR*, 225 U.S. at 325 (1912). Also that:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter [U.S. Constitution] of its own existence."

See *Mapp*, 367 U.S. at 659 (1960). Also that:

". . . it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, ... Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"

See *Marbury*, 5 U.S. at 180 (1803). Also that:

"Whenever a provision of the Constitution is applicable, the duty to enforce it is all-embracing and imperative."

See *Riverside*, 237 U.S. at 190 (1915).

Both lower courts have inflicted the most egregious injustices upon Petitioner, that it is very repugnant to a democracy. The Constitution requires judges to support, not "disregard", this supreme law of the land. See *Mapp*,367 U.S. at 367

Additionally, Petitioner has demonstrated that all of the judges of the D.C. Cir. have actually violated a F.R.A.P. by denying App.5. The D.C. Cir. panel decision [App.2] conflicts with a number of precedents of this Court related to fairness above.

F.R.A.P. 35(b)(1)(A) requires that if:

> ". . . the panel decision conflicts with a decision of the United States Supreme Court . . . consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions."

The entire D.C. Cir. violated this required necessity of maintaining "uniformity of the court's decisions." See *Id.* Can an entire U.S. Circuit Court violate a F.R.A.P., and sanction conflicts with various precedents of this Court related to fairness and justice ? Petitioner poses the most "all-embracing and imperative" [*Riverside*, 237 U.S. at 190] Federal Constitutional Question that could possibly exist:

Is the Constitution of the United States truly an enforceable law, OR can a widespread contingent of the Judicial Branch [such as the entire D.C. Cir. Court] disregard said Constitution as they please to without any concern ?

Respectfully submitted,

s/Tod N. Rockefeller, *pro se*

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TOD N. ROCKEFELLER, **No. 04-5290**
Plaintiff-Appellant,
v. **Filed On:** JUN 16 2005

MICHAEL O. LEAVITT, in his official capacity as Administrator, United States Environmental Protection Agency(EPA), (D.C. No. 03-1240)
Defendant-Appellee.

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/Michael C. McGrail
Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TOD N. ROCKEFELLER, **No. 04-5290**
Plaintiff-Appellant,
v. **Filed On:** FEB 23, 2005

MICHAEL O. LEAVITT, in his official capacity as Administrator, United States Environmental Protection Agency(EPA), (D.C. No. 03-1240)
Defendant-Appellee.

BEFORE: Edwards, Henderson, and Garland, Circuit Judges.

ORDER

Upon consideration of the motion for summary reversal, the response thereto, and the reply; the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary reversal be denied, and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam).
The district court properly dismissed Appellant's claims under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. The citizen suit provision of that statute does not authorize a private citizen to collect money damages from the United States **in these circumstances**. See Ailor v. City of Maynardville, 368 F.3d 587, 601 (6th Cir.

2004). Appellant's claims pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et. Seq., and the Constitution were properly dismissed for lack of subject matter jurisdiction as the government did not waive its sovereign immunity here. With respect to Appellant's 42 U.S.C. § 1983 and 42 U.S.C. § 1985 claims, the district court properly dismissed these for failure to state a claim. Likewise, Appellant has not stated a cause of action under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), because he has filed suit against the Administrator of the Environmental Protection Agency in the Administrator's official capacity. Because the district court's dismissal of the complaint was proper, the district court did not abuse its discretion in denying the motion for reconsideration. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after any timely petition for rehearing en banc. See Fed.R.App.P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/Michael C. McGrail
Deputy Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOD N. ROCKEFELLER,	}	
Plaintiff,	}	No. 03-1240
e.	}	
MICHAEL O. LEAVITT,	}	doc. 15
Administrator, United States	}	
Environmental Protection Agency,	}	**Filed On**:
Defendant.	}	**May 28, 2004**
	}	

ORDER

Upon consideration of the defendant's motion to dismiss,[1] it is hereby,

ORDERED that the defendant's motion to dismiss is GRANTED.

It is FURTHER ORDERED that this case shall be DISMISSED.

SO ORDERED this **28th day of May, 2004**.

REGGIE B. WALTON
United States District Judge

1. **A memorandum opinion will be issued in the near future.**

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOD N. ROCKEFELLER, Plaintiff, v.	No. 03-1240
MICHAEL O. LEAVITT,[1] Administrator, United States Environmental Protection Agency, Defendant.	doc. 16 **Filed On: Jun 7, 2004**

MEMORANDUM OPINION

This matter comes before the Court upon the Defendant's Motion to Dismiss ("Def.'s Mot.") the plaintiff's Amended Complaint ("Am. Compl."), which alleges violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq., the United States Constitution, and 42 U.S.C. §§ 1983 and 1985.[2] The defendant asserts that the plaintiff's complaint

1. Pursuant to Fed.R.Civ.P. 25(d)(1), the Court has substituted the current Administrator of the Environmental Protection Agency, Michael O. Leavitt, for the former Administrator, Christine T. Whitman.

2. Because of the plaintiff's status as a pro se litigant, the Court issued an Order on Jan. 9, 2004, as required by Fox v. Strickland, 837 F.2d 507 (D.C. Cir. 1988), where the plaintiff was notified of the potential consequences of failing to fully and completely respond to the defendant's dismissal motion. The plaintiff responded by filing Plaintiff's Supplemental Response to Defendant's Motion to Dismiss on February 9, 2004.

should dismissed because the Court lacks subject matter jurisdiction over the claims arising under the RCRA, the FTCA, and the Constitution; and, the plaintiff has failed to state a claim upon which relief can be granted for his claims arising under 42 U.S.C. §§ 1983 and 1985. Def.'s Mot. at 1. Upon consideration of the parties' papers and for the reasons set forth below, the Court will grant the defendant's motion to dismiss this case.[3]

I. Factual Background

The plaintiff is a former employee of the United States Department of Energy ("DOE") and was assigned to the Waste Isolation Pilot Plant ("WIPP") in New Mexico. During the course of his employment, the plaintiff allegedly raised numerous safety concerns regarding the WIPP. Am. Compl. Plaintiff Enclosure ("Pl. Enc.") VII at 1; see also Def.'s Mot., Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss ("Def.'s Mem.") at 1. On December 10, 1997, the DOE terminated the plaintiff's employment, citing as a reason for its action poor job performance. Id. However, it is the plaintiff's conten-

---

3. The plaintiff has filed four cases in this Court, and this will be the fourth one that will be dismissed. All four cases have dealt either involved directly the plaintiff's past employment with the DOE or the manner in which other courts have dealt with claims arising from this employment. See Rockefeller v. United States Court of Appeals for the Tenth Circuit, 248 F. Supp. 2d 17 (D.D.C. 2001)(Walton, J.); United States ex. rel. Rockefeller v. Westinghouse Elec. Co., 274 F. Supp. 2d 10 (D.D.C. 2003) (Walton, J.), aff'd., 2004 WL 180264 (D.C. Cir. 2004); Rockefeller v. Leavitt, Civ. A. No. 03-1240 (Walton, J.); Rockefeller v. Rehnquist, Civ. A. No. 03-1538 (Walton, J.), aff'd., 2004 WL 210649 (D.C. Cir. 2004).

tion that his termination was merely retaliatory action taken against him for his identification of safety deficiencies at the WIPP. Am. Compl., Pl. Enc. VII at 1.

On April 18th, 2001, the plaintiff submitted a petition to the Environmental Protection Agency ("EPA") pursuant to the RCRA, wherein he requested a public hearing for the withdrawal of "federal authorization of New Mexico's hazardous waste program." Def.'s Mem. At 1; Am. Compl. Enc. XI at 2. On July 12 , 2001, the EPA contacted the State of New Mexico Environment Department ("NMED"), which is charged with the administration of the WIPP, sending them a copy of the plaintiff's petition, notifying them of an informal investigation it was launching, and requesting a response or useful information pertaining to the petition. The NMED responded on April 10, 2002, and the EPA conducted an informal investigation, issuing a final decision denying the plaintiff's petition on July 9, 2003. Def.'s Mem. At 1-2; Am. Compl., Pl. Enc. XI at 2. The plaintiff filed his original complaint in this case on June 9, 2003, which was then amended on September 12, 2003.

II. Standard of Review

A. Rule 12(b)(1): Lack of Subject Matter Jurisdiction

As a threshold matter, a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d.9, 13 (D.D.C. 2001); see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998); Pitney Bowes, Inc. v. United States Postal Service, 27 F. Supp. 2d 15, 19 (D.D.C. 1998); Fed.R.Civ.P. 12(b)(1) requires that the plaintiff bear the burden of establishing by a preponderance of

the evidence that the court has jurisdiction to entertain his claims. Fed.R.Civ.P. 12(b)(1); Grand Lodge of Fraternal Order of Police, 185 F. Supp. 2d at 13; Pitney Bowes, 27 F. Supp. 2d at 19. This is because "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). See also Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Congress and statute, . . . which is not to be expanded by judicial decree"). Therefore, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen, 511 U.S. at 377 (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); Turner v. Bank of N. Am., 4 U.S. 8, 11 (1799)).

While **the Court must accept as true all the factual allegations contained in the complaint** when deciding whether to dismiss a case pursuant to Rule 12(b)(1), Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993), because the plaintiff has the burden of proof to establish jurisdiction, the "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim[.]" Grand Lodge of Fraternal Order of Police, 185 F. Supp. 2d at 13-14 (citation omitted). Therefore, in deciding whether to dismiss a complaint under 12(b)(1), the Court is not limited to the allegations in the complaint but

may consider "'such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case.'" Id at 14 (citations omitted).

B. Rule 12(b)(6): Failure to State a Claim Upon Which Relief Can Be Granted

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6), **this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the alleged facts**. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. Kowal, 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), **the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint**, and matters about which the Court may take judicial notice. E.E.O.C. v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997). The Court may dismiss a claim pursuant to Rule 12(b)(6)only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. Finally, although the Court may find that a literal reading of the plaintiff's complaint requires the conclusion that he has failed to state a claim upon which relief can be granted, because the

plaintiff is a pro se litigant, his complaint must be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding that allegations in pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers). Therefore, a pro se complaint will only be dismissed "for failure to state a claim upon which relief can be granted if 'it appears beyond reasonable doubt that the plaintiff can prove 'no set of facts in support of his claim that would entitle him to relief.'" Shekoyan v. Sibley Intern. Corp., 217 F. Supp. 2d 59, 64 (D.D.C. 2002) (citing Haines, 404 U.S. at 521; Price v. Phoenix Home Life Ins. Co., 44 F. Supp. 2d 28, 31 (D.D.C. 1999)).

III. Legal Analysis

A. Is The Defendant's Motion to Dismiss Timely?

At the outset, this Court must address the plaintiff's contention that the defendant's motion to dismiss is untimely and thus should be denied. The plaintiff asserts that because the United States did not file its motion to dismiss until December 5, 2003, despite being served with the amended complaint on September 30, 2003, the motion is untimely. Plaintiff's Response to Defendant's Motion to Dismiss ("Pl.'s Resp.") at 1-2. However, the United States responds that it was not served with the amended complaint until October 6, 2003, thereby rendering its response filed within the 60 day time requirement of Fed.R.Civ.P. 12(a)(3)(A). Defendant's Reply In Support of Motion to Dismiss ("Def.'s Reply") at 2.

Pursuant to Rule 12(a)(3)(A), the United States has sixty (60) days from the date of service of the complaint in which to file either a responsive pleading or a motion articulating a Rule 12(b) defense. Fed.R.Civ.P. 12(a)(3)(A). Service of process

upon an officer or employee of the United States being sued in his or her official capacity is governed by Fed.R.Civ.P. 4(i)(2)(A), which specifically provides that "[s]ervice on . . . an officer or employee of the United States sued only in an official capacity[] is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer [or] employee." Fed.R. Civ.P. 4(i)(2)(A). And Rule 4(i)(1) requires that:

> [s]ervice upon the United States shall be effected (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and (C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer of the agency.

Fed.R.Civ.P. 4(i)(1).

Here, the plaintiff's Proof of Service indicates, as reflected in an Affidavit of Service, that he sent copies of the complaint and the summons to the United States Attorney, the Administrator of the EPA, and the Attorney General John Ashcroft by certified mail on September 30, 2003. Proof of Service [Docket No. 4]. The records provided by the defendant indicate the United States Attorney's office received the complaint and summons on Monday, October 6, 2003. Def.'s Reply, Ex. B. The Tenth Circuit has held that a pro se plaintiff fails to prove service of process if he does not provide proof that the complaint and summons actually passed through the mail and was delivered to the defendant. Chester v. Green, 120 F.3d 1091(10th Cir. 1997) ("[t]here is no authenticating post office stamp on any receipt showing [that the complaint and summons] passed through the mails, nor is there a receipt of acknowledgment showing actual delivery of the complaint to the purported defendants. Moreover, there is nothing in the record indicating compliance with Fed.R.Civ.P. 4(i) pertaining to service upon officers of the United States."). Here, since the plaintiff has failed to submit the certified mail receipt, there is nothing in the record to rebut the defendant's evidence that the United States Attorney's office received the complaint and summons on October 6, 2003. With service of the summons and complaint having been effected on October 6, the defendant's response was not due until December 5, 2003. Therefore, because the defendant filed his motion to dismiss on December 5, 2003, it was filed timely.

B. Does The Court Lack Subject Matter Jurisdiction Over The Plaintiff's Claims Under the RCRA and the FTCA ?

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit . . . Sovereign immunity is jurisdictional in nature." F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (citations omitted). "Sovereign immunity bars any claim against [individual] defendants in their official capacities." Meyer v. Reno, 911 F. Supp. 11, 13 (D.D.C. 1996); see also Deutsch v. U.S. Dept. of Justice, 881 F.Supp.49 (D.D.C. 1995). This is because it is well established that "a claim against a federal employee in his or her 'official capcity' is in effect a claim against the government. The sovereign immunity doctrine cannot be evaded by changing the label on the claims or the parties." Travelers Ins. Co. v. SCM Corp., 600 F. Supp. 493, 497 (D.D.C. 1984) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 (1949); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982)). As such, where the defendant is an individual federal employee being sued in his or her official capacity, the defendant is protected by sovereign immunity unless the statute upon which the suit is brought specifically waives the immunity. Id.

To be effective, any waiver of sovereign immunity must be explicitly stated and "unequivocally clear within the statute's text. United States v. Nordic Village Inc., 503 U.S. 30, 33-34 (1992) (holding that "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'"); see also Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statutory text . . . and will not be implied") (citing Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 95 (1990)). "Moreover, a waiver of the Government's sovereign immunity will also be

strictly construed in terms of its scope, in favor of the sovereign." Lane, 518 U.S. at 192 (citing United States v. Williams, 514 U.S. 527, 531 (1995); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Lehman v. Nakshian, 453 U.S. 156, 161 (1981)). And, of particular significance to this case, the Supreme Court has stated in the context of the RCRA, "any waiver of the National Government's sovereign immunity must be unequivocal . . . . Waivers of immunity must be construed strictly in favor of the sovereign, . . . and not enlarge[d] . . . beyond what the language requires." United States Dept. of Energy v. Ohio, 503 U.S. 607, 615 (1992) (internal citations and quotation marks omitted). Furthermore, a waiver of sovereign immunity cannot be inferred from the statute's legislative history. See Lane, 518 U.S. at 192 ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text'") (quoting Nordic Vill., 503 U.S. at 37). Thus, where the language of a statute does not expressly waive the sovereign immunity of the United States, or it is ambiguous or vague on the subject, the United States is immune from suit and the Court lacks jurisdiction to hear the claim. See Shaw, 478 U.S. at 318 ("'[T]here can be no consent [to sue the United States] by implication or by use of ambiguous language'") (citing United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947)).

(1) Is the Defendant Immune From Suit Under the RCRA ?

The plaintiff's amended complaint asserts causes of action under the RCRA pursuant to 42 U.S.C. §§ 6902, 6924, 6925, 6926, 6928(e), 6971,

6972, and 6973.[4] As the defendant aptly points

---

4. 42 U.S.C. § 6902(a) lists eleven ways in which the RCRA aims "to promote the protection of health and the environment and to conserve valuable material and energy resources," as well as declaring in 42 U.S.C. § 6902(b) that it is the national policy of the United States, "whenever feasible," to reduce or eliminate hazardous waste as quickly as possible.

42 U.S.C. § 6924 requires the Administrator of the EPA to "promulgate regulations establishing standards for the generation, transportation, treatment, storage, and disposal of hazardous waste within eighteen (18) months of its enactment." Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 804 (D.C. Cir. 1983).

42 U.S.C. § 6925 "orders the EPA to promulgate a rule requiring every hazardous waste treatment, storage or disposal facility to apply for and secure a permit from the [EPA] Aministrator as a condition of operation." Gorsuch, 713 F.2d at 805.

42 U.S.C. § 6926 provides that "the EPA may authorize states to administer and enforce its own hazardous waste programs within the state." Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1416-17 (D.C. Cir. 1998).

42 U.S.C. § 6928(e) designates criminal sanctions for "[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . in violation of [specific requirements discussed in other parts of this section]."

42 U.S.C. § 6971 is the RCRA employee protection provision, "prohibit[ing], inter alia, discrimination against employees who have reported RCRA violations or testified in RCRA proceedings," and provides the procedure for reviewing alleged acts of discrimination. 42 U.S.C. § 6971.

42 U.S.C. § 6972 is the citizen suit provision of the RCRA, which provides private citizens with an enforcement mechanism by which they can act to ensure compliance with the statute. See 325-343 E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 685 (D.D.C. 1995) (Urbina, J.).

out, however, there is no language in sections 6902, 6924, 6925, 6926, 6928(e), 6971, 6972, and 6973 that provides for an explicit waiver of sovereign immunity by the United States that would permit an individual to bring actions against it. Accordingly, the Court must conclude that the government has not waived its sovereign immunity to permit the plaintiff to bring claims pursuant to these provisions of the RCRA. See Shaw, 478 U.S. at 318 ("we must construe waivers strictly in favor of the sovereign . . . .").

However, the RCRA does permit, in limited circumstances, an individual to bring a claim under the RCRA. The citizen suit provision contained in § 6972 "are an enforcement mechanism by which citizens can act as 'private attorney generals' to ensure compliance" with the RCRA. 325-343 E. 56th Street Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 685 (D.D.C. 1995) (Urbina, J.). Although the plaintiff did not specify which of the two sections of the citizen suit provision his claims are grounded, the Court will construe them as filed pursuant to 6972(a)(2), rather than 6972(a)(1). Subsection (a)(2) permits an action to be "brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia[.]" 42 U.S.C. § 6972(a), whereas actions under subsection (a)(1) may be brought only "in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." Id. Since the plaintiff's allegations all

---

4(. . . Continued) 42 U.S.C. § 6973 authorizes the Federal Government to initiate lawsuits for violations of RCRA.

involve the WIPP facility in New Mexico where the alleged wrongs about which plaintiff complains occurred and the plaintiff chose to bring this action in this district, he obviously is pursuing his claims under subsection (a)(2) in this Court.

Section 6972(a)(2) of Title 42 of the United States Code permits a plaintiff to bring a claim "against the Administrator [of the EPA] when there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The government's express waiver of sovereign immunity is conditioned upon the plaintiff providing notice to the Administrator as required under § 6972(c), which states:

> [n]o action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action . . . . Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

42 U.S.C. § 6972(c) (emphasis added). And, the Administrator of the EPA has promulgated a regulation, 40 C.F.R. § 254.2, that requires:

> (b) Service of notice of intent to file suit under [section 6972(a)(2)] of the Act shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Wash-

ington DC 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

40 C.F.R. § 254.2(b)-(c). The required notice must therefore be served in accordance with these requirements in order for the sovereign immunity to be waived and a suit filed against the United States under § 6972.[5] A-18

---

5. The Court notes that the sixty day waiting period for filing claims pursuant to 42 U.S.C. § 6972(a)(2) is waived when a plaintiff asserts a violation of Subchapter III of RCRA. 42 U.S.C. § 6972(c) ("No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chap- ter."). Here, the plaintiff has asserted that the defendant violated several provisions of Subchapter III, including 42 U.S.C. §§ 6924, 6925, 6926, and 6928(e). Notwithstanding the fact that the sixty day waiting period may be waived, the plain language of § 6972(c) makes clear that the plaintiff must still comply with the notification requirements. See Dague v. City of Burlington, 935 F.2d 1343, 1351-52 (2nd Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992) (concluding that the plaintiffs did not need to comply with the delay requirement for a subchapter III violation, but noting that the 'plaintiffs did give notice to the appropriate parties identified in the statute" and thus the Second Circuit distinguished the facts of Dague from the Supreme Court's decision in Hallstrom v. Tillamook County, 493 U.S. 20 (1989), where the Supreme Court concluded, in a non-subchapter III violation situation, that since the plaintiffs failed to comply with both the notice and the delay provisions, dismissal was appropriate.).

Covington v. Jefferson County, 358 F.3d 626, 636 (9th Cir. 2004) (finding that the "notice provisions are jurisdictional: Absent compliance with a required notice provision, we lack subject matter jurisdiction to hear the RCRA claims.").

The defendant asserts that sovereign immunity is not waived in the present case because the plaintiff failed to satisfy the notice requirement. See Def.'s Mem. At 10 ("There is no evidence in the Amended Complaint that Plaintiff provided EPA the required notice"); Def.'s Reply at 7 ("Defendant can find no evidence that Plaintiff provided copies [of notice] to the Regional Administrator or the Attorney General of the United States. Plaintiff's notice does not conform to the manner prescribed by EPA's regulations."). Nonetheless, the plaintiff contends that he provided notice to the EPA almost two years prior to commencing his suit in a paragraph attached to his April 18, 2001 petition to the EPA. See Pl.'s Resp. at 3; Am. Compl., Pl. Encl. I ("Notification of Noncompliance & Petition for a Public Hearing For Withdrawal of New Mexico's Authorized State Hazardous Waste Program") at 9. That paragraph states, in pertinent part:
"Notice is hereby given, in accordance with 42 U.S.C. § 6972(c), that if the EPA Administrator fails or refuses to perform nondiscretionary duties associated with this instant Notification/Petition, Petitioner-Appellant will file a citizen-suit against the EPA." Id. Also attached to the plaintiff's April 2001 petition is a sworn affidavit confirming that he mailed a copy of the document to the EPA Administrator and the NMED. Am. Copl., Pl. Enc. I. This does not amount to adequate notice. 40 C.F.R. § 254.2 specifically requires that the notice must be sent to the Administrator of the EPA by "registered

mail, return receipt requested" and that a copy must also be sent to the Attorney General. The plaintiff has proffered no evidence that he did the latter and, with regards to the former, the plaintiff merely contends that under oath that the petition was mailed to the EPA Administrator "with sufficient first class postage." Id. Therefore, because the plaintiff has failed to comply with the notice requirements of RCRA, this Court lacks subject matter jurisdiction over these claims and they must be dismissed.[6]

However, even if plaintiff had provided adequate notice, the Court would nonetheless have to dismiss his RCRA claims. "[B]ecause as private attorney generals, citizen-plaintiffs are supposed to be guided by the public benefits[,]" courts have found that the RCRA does not grant private citizens the right to collect money damages. 325-343 E. 56th Street Corp, 906 F. Supp. at 684; cf United States Dep't of Energy v. Ohio, 503 U.S. at 611 (finding that Congress has not waived the United States' sovereign immunity from liability for civil fines). In 325-343 E. 56th Street Corp., Judge Urbina stated that the "RCRA's citizen suit

---

6. The government also claims that "even if [p]laintiff had given notice, 42 U.S.C. § 6972 does not provide a waiver of sovereign immunity authorizing [p]laintiff's action against [the] EPA. [This is because, according to the government, i[t] is well settled that citizen suit provisions like section 42 U.S.C. § 6972 provide waivers of sovereign immunity for suits against the government acting in its regulatory capacity, but only where there is a failure tp perform an act or duty which is not discre- tionary, and [p]laintiff has alleged nothing to demonstrate such a failure." Def.'s Mem. At 11. The Court will not address this contention in light of its conclusion that the government has not waived its sovereign immunity for other reasons.

provisions, 42 U.S.C. § 6972(a)(1)(A) and (a)(1)(B), allow for abatement and injunctive measures, but not for money damages." 906 F. Supp. at 684 (citation omitted). **An examination of the plaintiff's amended complaint reveals that he does not seek to compel the EPA to take any actions, but simply wants to obtain compensatory and punitive damages.** Am. Compl. ¶¶ 43-44. Thus, the Court must dismiss the plaintiff's RCRA claims because Congress has not waived the federal government's sovereign immunity under the RCRA so as to permit a private citizen to collect money damages from the United States.

(2) Is the Defendant Immune From Suit Under the FTCA ?

> Under the FTCA, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). By its very terms, the FTCA "creates an express limited waiver of the United States' sovereign immunity, rendering the federal government and its agencies liable for certain 'tort claims, in the same manner

and to the same extent as a private person in like circumstances.'" Macharia v. United States, 238 F. Supp. 2d 13, 20 (D.D.C. 2002) (Kollar-Kotelly, J.) (quoting 28 U.S.C. § 2674(a)), aff'd, 334 F.3d 61 (D.C. Cir. 2003); see also Jayvee Brand, Inc. v. United States, 721 F.2d 385, 388 (D.C. Cir. 1983) ("The Federal Tort Claims Act is a limited waiver"). The language of the FTCA clearly limits the waiver of the United States' sovereign immunity to the extent that a cause of action is authorized by the law of a jurisdiction where an event occurred. Indeed,

> the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA. This is because the FTCA, by its terms, does not create new causes of action; rather, it makes the United States liable in accordance with applicable local tort law.

Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (internal citations omitted).

Here, the plaintiff fails to demonstrate the existence of any applicable state law duty that provides a basis for his FTCA claim against the defendant. His reliance on the New Mexico Tort Claims Act is misplaced as these statutes are merely New Mexico's counterpart of the FTCA's waiver of sovereign immunity, which do not establish any duty in tort owed to private persons.[7]

---

7. The plaintiff alleges that the New Mexico "Tort Claims Procedure" waives the state's sovereign immunity for violations of the Human Rights Act. Pl.'s Resp. at 5-6. The Court has been unable to ascertain what the New Mexico Tort Claims Pro-

Thus, the plaintiff has failed to allege a New Mexico tort law claim under which private individuals would be liable in like circumstances, thereby failing to state a claim sufficient to waive the United States' sovereign immunity under the FTCA.

For the first time in a supplemental response to the defendant's motion, the plaintiff cites New Mexico's perjury and conspiracy criminal statutes as well as two New Mexico employment discrimination statutes as the basis for his FTCA claims. Plaintiff's Supplemental Response to Defendant's Motion to Dismiss ("Supp. Resp.") at 11-13. However, in order to bring a claim under the FTCA, the plaintiff must first file a claim with the appropriate administrative agency. 28 U.S.C. § 2675(a). The plaintiff is permitted to bring suit in a district court only if the agency denies the claim or fails to make a final determination on the claim within six months of the filing. Id. This requirement serves to provide the agency notice of the claim and the opportunity to resolve the matter prior to the initiation of litigation. Indeed, this Circuit has held that

---

7 (. . . Continued)
cedure is, however, the New Mexico Tort Claims Procedure provides: "(a) government entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of . . . the United States of America, if the public employee was acting within the scope of his duty." 41-4-4C NMSA 1978 (2003 Suppl.). The New Mexico Tort Claims Act also provides that "(a) government entity shall pay any settlement of any final judgment entered against a public employee for: (2) a violation of . . . any rights, privileges, or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty." 41-4-4D NMSA 1978 (2003 Suppl.).

"Section 2675(a) remains, without regard to the character of the claim presented, a requirement of notice." GAP Corp. v. United States, 818 F.2d 901, 921 (D.C. Cir. 1987). The information provided to the agency must be sufficient to "measure up to what is necessary for the United States to investigate or evaluate the claim." Id. (citation omitted). In this case, the plaintiff's assertion of these criminal and employment discrimination statutes in his supplemental response does not comport with § 2675(a)'s requirement that the United States have sufficient notice of the claim prior to commencement of a civil suit in district court.

Finally, the plaintiff also attempts to utilize the "discretionary function exception" of the FTCA as a predicate for his sovereign immunity waiver position. As this Court explained in Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191 (D.D.C. 2002) (Walton, J.):

> While the FTCA authorizes federal courts to hear suits against the United States, see 28 U.S.C. § 1346(b) (2000), Congress has placed certain limitations on this broad waiver of sovereign immunity in 28 U.S.C. § 2680 (2000). Cope v. Scott, 45 F.3d 445, 447-48 (D.C. Cir. 1995). Pertinent to this case is the "discretionary function" exception of § 2680(a), which states, in part, that the United States will not be liable under the FTCA for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused." 28 U.S.C.

§ 2680(a). If the discretionary function exception applies, then this Court must dismiss the FTCA claims pursuant to Fed.R.Civ.P. 12(b)(1) because it lacks subject matter jurisdiction to entertain [such] claims. See Burkhart v. WMATA, 112 F.3d 1207, 1216 (D.C. Cir. 1997) (citing Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("holding that an Eleventh Amendment claim cannot be waived as it is jurisdictional")); Cope, 45 F.3d at 448.

Id. at 196-97 (internal footnote omitted). It appears to the Court that the plaintiff has asserted numerous violations committed by both DOE and the NMED that serve as the basis for his FTCA claims against the defendant. Am. Compl., Pl. Encl. I, Ex. 4; Encl. VI at A-9; Encl. IV at 46-50. A review of these alleged violations, which served as the basis for an earlier complaint filed by the plaintiff against the NMED, reveals that the plaintiff is now claiming that the defendant in this case is liable under the FTCA for his failure to properly investigate these allegations. In Gustave-Schmidt, this Court explained that:

> [t]he District of Columbia Circuit has stated that "[t]he decision to initiate a prosecution has long been regarded as a classic discretionary function." Sloan [v. HUD], 236 F.3d 765, 760 (D.C. Cir. 2001) (citations omitted); see Gray [v. Bell], 712 F.2d 490, 513 (D.C. Cir. 1983) (describing prosecutorial decisions as a "quintessential example[] of governmental discretion"). The Circuit Court has treated prosecutorial decisions and decisions to initiate administrative proceedings by an

> agency, such as the [EPA], as analogous discretionary counterparts. Sloan, 236 F. 3d at 760 (citing Butz v. Economou, 438 U.S. 478, 515 (1978) (holding that "[t]he decision to initiate administrative proceedings against an individual . . . is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought . . ."). The decision to prosecute or to initiate an administrative proceeding generally having been the byproduct of an investigation, logically calls for the investigation itself also being treated as a discretionary function. See Gray, 712 F.2d at 515-16 (treating investigatory conduct as "inextricably tied" to decision to prosecute).

226 F. Supp. 2d at 198-99. Thus, the defendant's alleged failure to properly investigate these allegations of wrongdoing by the DOE and the NMED cannot serve as the basis for an FTCA claim because the EPA's decision not to investigate a matter is a discretionary decision that is not subject to judicial review. Accordingly, the Court concludes that it lacks the authority to exercise subject matter jurisdiction over the plaintiff's FTCA claim.

(3) Does The Court Lack Jurisdiction to Hear the Plaintiff's Constitutional Claims ?

As another basis for the Court having the authority to exercise jurisdiction in this matter, the plaintiff relies on the United States Constitution. See Am. Compl. ¶ 3. But, "[t]he Constitution does not waive the Government's sovereign immunity in

a suit for damages." Garcia v. United States, 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832 (1982) (citations omitted). While Congress may waive the Government's sovereign immunity explicitly in the language of a statute, see Nordic, 503 U.S. at 33-34, the Constitution itself cannot be used as a basis for a cause of action which seeks money damages against the United States. See Navy, Marshall & Gordan v. United States, 557 F. Supp. 484, 487-88 (D.D.C. 1983); see also Garcia, 666F.2d at 966. Because "[a] suit against a federal in his or her official capacity is a suit against the United States," Travelers Ins. Co., 600 F. Supp. at 497 (citations omitted), the Court is without jurisdiction to entertain the plaintiff's First and Fifth Amendment Constitutional claims.

C. Has The Plaintiff Failed to State A Claim Upon Which Relief Can Be Granted Pursuant to 42 U.S.C. §§ 1983 and 1985 ?

(1) The Plaintiff's § 1983 Claim

To establish a claim under section 1983, a plaintiff must prove: (1) "that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States" and (2) "the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.'" Adickes v. Kress & Co., 398 U.S. 144, 150 (1970); see Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701, 708-09 (2003) ("[s]ection 1983 permits 'citizen[s]' and 'other person[s] within the jurisdiction' of the United States to seek legal and equitable relief from 'person[s] who, under color of state law,

deprive them of federally protected rights"); Parratt v. Taylor, 451 U.S. 527, 535 (1981) (holding that § 1983 permits recovery only where the defendant has acted under color of state law to deprive the plaintiff of rights guaranteed by the Constitution and laws of the United States); Brown v. District of Columbia, 251 F. Supp. 2d 152, 164 (D.D.C. 2003) ("[t]o state a claim for relief under § 1983, a plaintiff must allege (1) a violation of a right secured by the Constitution or by federal law, and (2) that the deprivation was committed by a person acting under color of state law") (citations omitted). "Because section 1983 provides a remedy for violations of federal law by persons acting pursuant to state law, federal agencies and officers are facially exempt from section 1983 liability inasmuch as in the normal course of events they act pursuant to federal law." Hindes v. Federal Deposit Ins. Corp., 137 F.3d 148, 158 (3rd Cir. 1998). Here, the defendant is a federal, not a state, official. Furthermore, as the defendant notes, "[t]he plaintiff's claim relates only to action taken under federal law. There is no implication, much less allegation, in the amended complaint, that the EPA has taken any action under state law." Def.'s Mem. At 18. Therefore, because the plaintiff is challenging the actions of federal officials taken in their official capacity and not under color of state law, the plaintiff has failed to state a claim under § 1983 upon which relief can be granted.

(2) The Plaintiff's § 1985 Claim

In order to establish a claim under § 1985, a plaintiff

> must allege: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in [his] person or property or deprived of any right or privilege of a citizen of the United States.

Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987) (citing Hobson v. Wilson, 737 F.2d 1, 14 (D.C. Cir. 1984); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)); see also Estate of Philips v. District of Columbia, 257 F. Supp. 2d 69, 82 (D.D.C. 2003). The Martin Court observed that § 1985 only applies to those violations "motivated by some class-based, invidiously discriminatory animus." 830 F.2d at 258 (quoting Hobson, 737 F.2d at 14).

The defendant maintains that the plaintiff has not asserted nor produced evidence of the first three elements of a section 1985 claim. For example, he does not present himself as a member of any special class. And, he does not assert that such membership was the motivation behind any alleged deprivation of his constitutional rights. The defendant is correct, and the plaintiff's failure to establish these two elements alone requires the Court to dismiss his section 1985 claim. See Mittleman v. U.S. Treasury, 773 F. Supp. 442, 449 (D.D.C. 1991) (pro se plaintiff's § 1985 claim dismissed for failing to "set forth even conclusory assertions that would support a finding of class-based animus").

IV. Conclusion

For the aforementioned reasons, the Court will grant the defendant's motion to dismiss all of the plaintiff's claims. Absent a waiver of sovereign immunity, the Court lacks subject matter jurisdiction over the plaintiff's RCRA, FTCA and constitutional claims. And, the plaintiff has failed to establish claims under §§ 1983 and 1985 upon which relief can be granted. Accordingly, this case is dismissed.[8]

SO ORDERED this 7th day of June, 2004.

REGGIE B. WALTON
United States District Judge.

8. An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

TOD N. ROCKEFELLER,	Case No.
former	04 - 5290
ENVIRONMENTAL SCIENTIST,	
WASTE ISOLATION PILOT PLANT	USDC - D.C.
(WIPP) CARLSBAD AREA OFFICE,	No. 03-1240
UNITED STATES DEPARTMENT	
OF ENERGY (DOE),	
Plaintiff / Petitioner - Appellant	
v.	
MICHAEL O. LEAVITT, in his Offi-	
cial Capacity as ADMINISTRATOR,	
U.S. ENVIRONMENTAL	
PROTECTION AGENCY (EPA),	
Defendant / Respondent - Appellee	

Petition for Rehearing by the Panel and Petition for Rehearing En Banc

I. Introduction

Petitioner-Appellant was stationed at the DOE's WIPP, which is a repository for defense program generated transuranic nuclear waste **This captioned Complaint is solely an employment discrimination tort claim.** The only action that Petitioner- Appellant (henceforth "P-Appellant") wishes Appellee to take is to nego- tiate with the DOE for P-Appellant's reinstatement to a position other than at the WIPP Project.

P-Appellant is filing a combined pleading as captioned above. See DC Cir. HdBk at 57. Appeal

No. 04-5290 was dismissed by this Court with an Order filed on 2/23/05. This Court's 2/23/05 Panel Decision (henceforth "2/23 PD")[attached as Addendum I] will be shown to have not followed, or departed from, every precedent of this Court and the Supreme Court ("Sup.Ct.") related to fairness and justice. As a result, "consideration by the full court is therefore necessary to secure and maintain uniformity in the court's decisions." See Fed.R.App.P. 35(b)(1)(A). **The 2/23 PD takes the opposite position of what the established and admitted facts** [see attached Addendum II] **require**, as will be very clearly demonstrated below.

The pleading of P-Appellant to this Court labeled as "Addendum II" (henceforth "Add. II") is very comprehensive and addresses all of the issues. Another pleading of P-Appellant (doc. 23), which was attached as "Exhibit I" to P-Appellant's Motion for Summary Reversal (henceforth "MfSR") to this Court, details how the district court had very clearly violated Canons 1 through 3 of the Judicial Codes of Conduct that relate to impartiality, bias, lack of integrity, and prejudice. Now . . . the 2/23 PD does the same. No policy of the U. S. warrants such treatment of P-Appellant by the district court and this Court.

The potential damage to this Court, related to the public reputation of the judicial proceedings of the Court, is not worth inflicting, especially considering the nature of the Complaint described above [a simple tort claim only]. The 2/23 PD has refused to apply the rule of law, and is a clear demonstration of partisan prejudice against P-Appellant. The public should not be provided with

an example of a judicial proceeding that might be expected from a fascist regime, and not a democracy. P-Appellant is in search of a judge[s] from this Court that has the courage to enforce the law. *Fiat justicia ruat coelum* ("Let justice be done though the heavens fall").

II. Facts and Law

The 2/23 PD makes six claims. P-Appellant will respond to each claim by first quoting said claim, and then pointing out how Add. II had responded to each with facts and applicable law. It will become very clear that each and every one of the 2/23 PD's six claims represent plain and harmful error.

A. "The district court properly dismissed Appellant's claims under the Resource Conservation and Recovery Act ["RCRA"], 42 U.S.C. § 6901 et seq.. The citizen suit provision of that statute does not authorize a private citizen to collect money damages from the United States in these circumstances. See *Allor v. City of Maynardville*, 368 F.3d 587, 601 (6th Cir. 2004)."

The district court had made the same claim as above in regard to RCRA. Within App. II at 8, P-Appellant had replied as follows:

> "While this may be true for environmental violations, it is not true for discrimination against an employee due to RCRA administration that 42 U.S.C. § 6971(e) prohibits. It can not be claimed that, under RCRA, the United States is not liable for money

damages for intentional discrimination, while under the 1991 Civil Rights Act [Compensatory Damages Amendment (CDA)] the United States is liable for such damages. See *West v. Gibson*, 527 U.S. 212, 215 (1999)."

The *Ailor* case cited by the 2/23 PD deals with the "frequent discharge of raw sewage, and other pollutants, ..." See *Ailor*, 368 F.3d 587, Sec. I.B.2. The decision in *Ailor* is obviously inapposite to P-Appellant's Appeal [04-5290]. The 2/23 PD attempts to convey that the specific facts related to RCRA in *Ailor*, are the same as this instant Appeal "in these circumstances." This contention is obvious and plain error. E.g.: *Ailor* deals with "discharges" and violation of a permit, NOT with employment discrimination violating RCRA's employee protection provision [42 U.S.C. § 6971] as this case does. The 2/23 PD is an abuse of discretion because its "findings rest on an erroneous view of the law, . . ." See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-02 (1990).

B. "Appellant's claims pursuant to the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 2671 et seq., and the Constitution were properly dismissed for lack of subject matter jurisdiction as the government did not waive sovereign immunity here."

1. FTCA - within P-Appellant's Motion for Summary Reversal ["MfSR"] at 3, 4 it is specifically detailed that under the FTCA:

"the immunity of Appellee is waived if there is a failure of Appellee to perform a

nondiscretionary duty. See 28 U.S.C. § 2680(a); See also *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); doc. 23 at 6, 7; doc. 24 at 6 - 10. Appellant had very specifically detailed the nondiscretionary duty of Appellee concerning 42 U.S.C. § 6971(e) within doc. 17 at 7 - 9 ["Claim 7"]; doc. 23 at 6, 7; doc. 24 at 6 - 10."

The nondiscretionary duty within RCRA [42 U.S.C. § 6971(e)] is as follows:

> "Any employee who is discharged, or . . . otherwise discriminated against by any person because of the alleged results of such [RCRA] administration or enforcement, . . . , may request the Administrator [Defendant] to conduct a full investigation of the matter. **The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings . . . .**"

See doc. 23 at 6.

P-Appellant had thoroughly detailed the request he had made to Appellee concerning § 6971(e), for a required investigation and public hearing, to the district court and this Court on five separate occasions. See App. II at 3; MfSR at 2-4; doc. 24 at 6, 7; doc. 23 at 6; and doc. 17 at 7-9. **It is undisputed fact that Appellee refused to perform the nondiscretionary duties required by § 6971(e).**

Similarly, P-Appellant had given detailed notice to Appellee that his rights had also been violated under color of New Mexico State law

concerning perjury and conspiracy. The first very detailed notice consisted of 122 pages and was dated April 18th, 2001. The second notice [FTCA Standard Form 95] was dated March 10th, 2003. See Add. II at 4, 5, 9, 10; See also MfSR at 6. P-Appellant had repeatedly satisfied and exceeded the FTCA notice requirements specified by a panel of this Court. See *GAF Corp. v. United States*, 818 F.2d 901, 921-22 (D.C. Cir. 1987)[App. II at 9].

P-Appellant had certainly established above that the United States had waived its sovereign immunity. The 2/23 PD had refused to acknowledge or consider five different pleadings and very specific alleged facts of P-Appellant. Several panels of this Court and the Sup.Ct. have established that:

> " In reviewing the district court's dismissal of *Gray's* suit we must accept all of appellant's allegations as "entirely true." *Buckley v.Fitzsimmons*, 509 U.S. 259, 261 (1993)."

See *Gray v. Poole*, No. 01-7052, Sec. II (D.C. Cir. Jan. 8th, 2002); See also *Atchinson v. District of Columbia, et al.*, No. 94-7195, Sec. II (D.C. Cir. Jan. 19th, 1996). The Sup.Ct. has ruled that the:

> ". . . proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is indefensible. See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 410; Fed. Rule Evid. 403; Fed. Rule Evid. 802."

See *Montana v. Egelhoff*, 518 U.S. 37 (1996). The district court's and the 2/23 PD's refusal to admit this evidence "was a clear abuse of discretion." See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988). In regard to P-Appellant's FTCA claims above, the 2/23 PD conflicts with the Sup.Ct. rulings in *Cooter & Gell*, *Gaubert*, *Berkovitz*.

Buckley, *Taylor*, *Montana*, and *Beech Aircraft*; see also the *GAF Corp.*, *Gray*, and *Atchinson* panels of this Court listed *supra*.

2. Constitution - as clearly detailed above Appellee refused to afford P-Appellant with the equal protection of RCRA's employee protection provision[§ 6971(e)]. The Sup.Ct. has ruled that

> ". . . a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment . . ."

See *Davis v. Passman*, 442 U.S. 228, 242 (1979). The Sup.Ct. has also ruled that deprivation of constitutional rights by a government official is "litigable in the federal courts of the District." See *District of Columbia v. Carter*, 409 U.S. 418, 433 (1973). In addition, the Sup.Ct. has ruled:

> ". . . violation [of the Constitution] . . . by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."

See *Bivens v. Six Unknown Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388, 389 (1971); See also *Butz v. Economou*, 438 U.S. 478, 485-86 (1978); *Cort v. Ash*, 422 U.S. 66, 67 (1975). In regard to P-Appellant's constitutional claims, the 2/23 PD conflicts with the Sup.Ct. rulings in *Davis*, *D.C. v. Carter*, *Bivens*, *Butz*, and *Cort*. P-Appellant's *Bivens* cause of action will be discussed further below.

C. " With respect to Appellant's 42 U.S.C. § 1983 and 42 U.S.C. § 1985 claims, the district court properly dismissed these for failure to state a claim."

P-Appellant's MfSR at 2, 3 to this Court [Seventh & Eighth Issues] outlined how the district court "improperly denied" a "timely and unopposed Motion for Enlargement of Time (doc. 21) to file doc. 23 . . . ." Due to these circumstances, doc. 23 was "Exhibit I" to the MfSR. Said doc. 23 at 11 stated the following panel decision of this Court:

> "'To state a claim for relief under § 1983, a plaintiff must allege (1) a violation of a right secured by the Constitution or by federal law, and (2) that the deprivation was committed by a person acting under color of state law.' See *Brown v. District of Colombia*, 251 F. Supp. 2d 152, 164 (D.C. Cir. 2003); See also *Parratt v. Taylor*, 451 U.S. 527, 534-35 (1981)."

What has been outlined above, concerning Appellee's denial of equal protection of the law [42 U.S.C. § 6971(e)] for P-Appellant, certainly met the requirements of the *Brown* precedent of this Court. An alleged conspiracy was also outlined to properly state a 42 U.S.C. § 1985 claim contrary to what the 2/23 PD claims. See App. II at 12, 13. The 2/23 PD again overturns the precedents of *Cooter & Gell*, *Buckley*, *Gray*, *Atchinson*, *Taylor*, *Montana*, and *Beech Aircraft* listed *supra*. Severe injustice, bias, and prejudice is so obviously delivered against P-Appellant by the 2/23 PD, that it is very repugnant to a democracy.

D. " Likewise, Appellant has not stated a cause of action under *Bivens v. Six Unknown Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388, 389 (1971), because he has filed suit against the Administrator of the Environmental Protection Agency in the

Administrator's official capacity."

P-Appellant was never made aware of this issue either by the district court or Appellee as a defense. If Appellant had been challenged with said issue, he would have responded by noting that the Complaint was suing for punitive damages and that he had repeatedly been claiming that he had a "*Bivens* cause of action." *Cf* App. II at 11, 12.

A panel of this Court [*Atchinson v. District of Columbia, et al.*, No. 94-7195 (D.C. Cir. Jan. 19, 1996] had ruled that a District of Columbia **police officer being:**

> **"sued in his individual capacity does find some support in the record. For example, *Atchinson* sued the District and its officials for punitive damages."**

See *Atchinson* at Sec. II. The *Atchinson* Panel further ruled that:

> "In *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991), the Seventh Circuit reversed a district court's refusal to allow a plaintiff's amendment naming a defendant in his individual capacity to relate back. *Id* at 1372-78. The *Hill* court pointed out that the plaintiff's claim for punitive damages should have made it clear to the defendant that he was being sued in his individual capacity. . . . . *Id*."

Likewise, it should have "made it clear" to Appellee that "he was being sued in his individual capacity." *Id*.

In addition, the 2/23 PD brings up an issue for the first time that P-Appellant never had an opportunity to address. In regard to this, a panel of this Court ruled that **the Circuit has a:**

"**usual practice of refusing to consider issues not raised before the district court**. See *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994)."

Also, P-Appellant went further than what the *Hill* court ruled was sufficient notice that a defendant was being sued in his individual capacity by making his claim for a "*Bivens* cause of action." App. II at 11, 12. The 2/23 PD was also supposed to:

> "construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant plaintiff the benefit of all inferences that can be derived from the alleged facts."

See Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A complaint for punitive damages, along with a claimed *Bivens* cause of action, without any doubt gives the "inference" that the government official is being sued in his individual capacity. See *Id*. The 2/23 PD refused to follow the *Atchinson*, *Hill*, *Marymount Hospital* and *Kowal* precedents or panel decisions above.

E. " Because the district court's dismissal of the complaint was proper, the district court did not abuse its discretion in denying the motion for reconsideration. See *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)."

What has been detailed above gives absolutely NO doubt that the "district court's dismissal of the complaint was" NOT "proper" as the 2/23 PD claims. Both the district court's ruling and the

2/23 PD actually fit the *Firestone* Panel's precedent of what constitutes an abuse of discretion. E.g.: claims of the 2/23 PD above have been shown to be "erroneous." See *Id.*

F. " The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987)."

The "merits" of P-Appellant's position is "so clear as to warrant" the "summary action" of reversal of the district court's ruling [03-1240]. The 2/23 PD has erroneously applied the *Taxpayers Watchdog Inc* panel decision, and is clearly an abuse of discretion.

The Sup.Ct. has ruled that: "A district court, by definition, abuses its discretion when it makes an error of law." See *Koon v. United States*, 518 U.S. 81, 100 (1996); See also *United States v. Olano*, 507 U.S. 725 - 26 (1993); *United States v. Young*, 470 U.S. 1, 15 (1985).

VI.. Conclusion

P-Appellant had outlined established facts going far beyond only specifying genuine issues of material fact in dispute, which would require that the case go to trial. See *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Associated Press v. United States*, 326 U.S. 1, 6 (1945); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990); and *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944). **The 2/23 PD clearly conflicts with all of the Sup.Ct. decisions above.**

Prayer for Relief

Petitioner prays that this Court issues an order granting this instant Petition for the justifications outlined above. Such an order would be a very large step towards vindicating Petitioner's constitutional rights and restoring faith in his government.

Respectfully submitted,

Dated & Served: April 5th, 2005

s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541